

REMARKS

The present Amendment is in response to the Final Office Action mailed June 26, 2006, in the above-identified application. Enclosed herewith is a Petition requesting a three-month extension of time for resetting the deadline for responding to the Final Office Action from September 26, 2006, to and including December 26, 2006. Applicants also enclose herewith a Notice of Appeal.

In the present Amendment, claim 8 has been amended to correct a typographical error. Applicants respectfully request that the amendment of claim 8 be authorized because entry of the amendment requires no further search or consideration by the Examiner.

In the Final Office Action, the Examiner rejected claims 1-4, 6-11 and 13 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,360,308 to Gross et al. in view of U.S. Patent No. 5,609,635 to Michelson. Referring to FIGS. 1 and 2 thereof, Gross discloses an intervertebral disc having domes 3,4 that are located in the central area of the respective upper and lower surfaces 1,2. Each of the raised domes 3,4 is surrounded by roof-shaped projections 5,6. The Examiner acknowledges that Gross fails to teach an implant having a center that is substantially flat, however, the Examiner has cited Michelson as teaching an implant having a substantially flat center surface.

In response to the rejection, Applicants respectfully assert that the Examiner has not established a *prima facie* case of obviousness, because the prior art provides no suggestion or motivation to modify Gross or to combine the teachings of Michelson with Gross. Applicants respectfully assert that the Examiner has merely used the claims of the present application as a roadmap to piece together the prior art. As noted in *In re*

Vaeck, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991), the teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in the Applicant's disclosure.

The Examiner has also not established a *prima facie* case of obviousness, because the proposed modification cannot render the prior art unsatisfactory for its intended purpose. As noted in *In re Gordon*, 221 U.S.P.Q. 1152 (Fed. Cir. 1984), if the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. See M.P.E.P. Section 2143.01(V). Applicants respectfully assert that it would not be obvious to modify Gross as suggested by the Examiner. In fact, Gross specifically teaches that the central domes 3,4 are essential because they prevent the implant from moving after being inserted between vertebrae. See Col. 4, lns. 1-5. For these reasons, Applicants respectfully assert that if the Gross implant were modified as suggested by the Examiner (to remove the central domes), then the implant would be unsatisfactory for its intended purpose.

For the above reasons, Applicants respectfully assert that claim 1 is unobvious.

Applicants respectfully assert that claim 3 is unobvious because the cited references neither disclose nor suggest an intervertebral spacer whereby "the spacer body has at least two relative angle designation marks on at least one of the upper and lower surfaces." FIGS. 4A and 4B show the relative angle designation marks. Such marks are provided on "at least one of said upper and lower surfaces such that a surgeon user may readily visually determine the rotational angle of said disk spacer element relative to a known reference." See paragraph [0040] of the originally filed specification. Clearly, Gross provides no such "relative angle designation

marks" and this deficiency is not overcome by the Michelson reference.

Independent claim 4 is unobvious for essentially the same reasons set forth above with respect to claim 1. Claims 5-7 are unobvious, *inter alia*, by virtue of their dependence from claim 4. Claim 8 is obvious because the cited references neither disclose nor suggest an intervertebral spacer whereby "the spacer body has at least two relative angle designation marks on at least one of the upper and lower surfaces."

Independent claim 9 is unobvious for essentially the same reasons set forth above with respect to claim 1. Claim 10 is unobvious, *inter alia*, by virtue of its dependence from claim 9. Claim 11 is unobvious because the cited references neither disclose nor suggest an intervertebral implant whereby "the spacer body has at least two relative angle designation marks on at least one of the upper and lower surfaces." Claim 13 is unobvious, *inter alia*, by virtue of its dependence from claim 11, which is unobvious for the reasons set forth above.

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue.

If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

If there are any additional charges in connection with this requested Amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

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Respectfully submitted,

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